

SERVICE DATE

MAR 14 1991

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of	)	
	)	DOCKET NO. UE-901596
TANNER ELECTRIC COMPANY	)	
	)	DECLARATORY ORDER
for a Declaratory Order	)	
. . . . .	)	

PROCEEDING: On December 27, 1990, Tanner Electric Cooperative ("Tanner") filed a Petition for Declaratory Order. The Petition seeks a ruling whether RCW 80.28.110 requires Puget Sound Power & Light Company ("Puget") to serve Nintendo Company on request. The Petition also seeks an order declaring that Puget's actions violate a Service Area Agreement between Tanner and Puget.

Tanner and Puget submitted stipulated facts and documents. The parties filed briefs. The parties agreed to submit the record directly to the Commission for decision.

SUMMARY: The Commission finds that, under the stipulated facts and documents, Puget does not have a statutory obligation to serve Nintendo. The Commission does not have jurisdiction to adjudicate the parties' rights under the Service Area Agreement.

APPEARANCES: Petitioner Tanner was represented by Allan R. Billet, president, and by Daryl G. Rank, attorney, Snoqualmie. The Commission staff was represented by Jeffrey D. Goltz, assistant attorney general, Olympia. Puget was represented by James M. Van Nostrand, attorney, Bellevue.

MEMORANDUM

I. PROCEDURE

Tanner filed its Petition for Declaratory Order on December 27, 1990.

After proper notice, a prehearing conference was held on February 7, 1991. Notice of the prehearing conference was sent to Nintendo Corporation. Nintendo did not appear at the prehearing conference.

At the prehearing conference, the parties agreed to submit the issues on stipulated facts, directly to the Commission. Tanner and Puget jointly filed a "Stipulation of Record" on February 15, 1991. The Stipulation included stipulated facts and stipulated documents.

The parties filed simultaneous briefs on March 1, 1991.

No party requested authority to file reply briefs.

II. STIPULATION OF FACTS AND DOCUMENTS

A. Facts

The following are the stipulated facts submitted by Tanner and Puget, on which the Commission's order is based.

1. Puget is an investor-owned electric utility operating in the Puget Sound region of western Washington, and is an "electric company" as defined in RCW 80.04.010.

2. Tanner is a nonprofit corporation serving its members with electric energy. Tanner is a "cooperative" within the meaning of RCW 54.48.010(2), and is financed under the auspices of the Rural Electrification Act.

3. Tanner is a preference customer of the Bonneville Power Administration ("BPA"). Pursuant to Contract No. DE-MS79-81BP90565 date August 26, 1982 between BPA and Tanner, BPA is required to provide all of Tanner's power needs up to 25 MW. BPA does so by wheeling power to Tanner over the lines and facilities of Puget.

4. Pursuant to Supplement No. 10 of Contract No. 14-03-011-11487 between Puget and BPA, Puget wheels electric power provided by BPA to Tanner at the North Bend point of delivery. The demand limit applicable to such wheeling service (above which Puget is not obligated to deliver power) is 2.6 MW, which will be increased upon implementation of the Puget-BPA plan of service for the North Bend area. In December 1990, deliveries of electric power to Tanner at the North Bend point of delivery reached a demand of 4.8 MW.

5. Nintendo of America, Inc. ("Nintendo") owns a 125-acre site near North Bend, Washington. The Nintendo site is located in part within the service area of Tanner and in part within the service area of Puget, as these areas are defined in the Service Area Agreement (Document No. 1).

6. The building constructed as the first phase of Nintendo's site development (the "Phase I Facility") is wholly located within the service area of Tanner, as that service area is defined in the Service Area Agreement (Document No. 1).

7. Tanner provided and continues to provide temporary electric service to Nintendo during construction of the Phase I Facility.

8. The point of delivery for permanent electric service to the Nintendo site is within the service area of Puget, as that service area is defined in Document No. 1.

9. On January 17, 1991, Puget began providing electrical service to the Phase I Facility.

10. Electrical service provided by Puget to Nintendo is pursuant to Schedule 31 of Puget's Electric Tariff G.

11. The anticipated electrical usage by the Nintendo Phase I Facility is 750 kVA.

12. During the next five to ten years, Nintendo plans to construct additional buildings of the Nintendo site, some of which may be located within the service area of Puget, as that service area is defined in Document No. 1.

13. Approximately 10 of the 36 lots in the Swan Lake subdivision (located at the corner of Union Hill Road and 238th Ave. NE) are within the service area of Tanner, as that service area is defined in Document No. 1. Approximately 16 of the 74 lots in the Emerald Pointe subdivision (located at the intersection of Ames Lake Road and Redmond-Fall City Road) are within the service area of Puget, as that service area is defined in Document No. 1.

B. Documents

Tanner and Puget stipulated that copies of the following documents attached to the Stipulation were true and correct copies of the authentic documents. The Commission also relied on these documents in making its order. The documents are not attached to this order, but are incorporated herein by this reference.

1. Agreement between Puget and Tanner dated July 29, 1966 (the "Service Area Agreement").

2. Letter dated October 20, 1967 between Louis Towne, Manager of Tanner, and E. L. Bush, Manager, North Central District of Puget.

3. Application dated October 29, 1973 filed by Puget with the Washington Utilities and Transportation Commission (the "Commission").

4. Order of the Commission dated January 9, 1974 in Cause No. U-73-44.

5. Letter dated June 18, 1987 between D. R. Traylor,

Director, North Central Division of Puget, and Elmer Sams, Manager of Tanner.

6. Letter dated July 21, 1988 between D. R. Traylor, Director, North Central Division of Puget, and Elmer Sams, Manager of Tanner.

7. Expanded environmental checklist dated March 23, 1989 and updated May 25, 1990, as filed by Nintendo with City of North Bend Planning Department.

8. Map of the Nintendo site, and on which has been drawn the point of delivery and the service area boundary as such boundary is defined in the Service Area Agreement (Document No. 1).

9. Map entitled "Site Plan" dated September 26, 1990, filed with City of North Bend Planning Department, showing detail of the planned siting of the Phase I Facility, and on which has been drawn the point of delivery ("meter point") and the service area boundary as such boundary is defined in the Service Area Agreement (Document No. 1). The parties cannot determine whether the building was in fact situated precisely in accordance with the Site Plan.

10. Portion of sheet number TO.1 entitled "General", filed with City of North Bend Planning Department, showing the Nintendo site.

11. Puget's most recent least cost plan entitled "Securing Future Opportunities 1990-1991," dated December 1989 as filed by Puget with the Commission.

12. Letter dated September 28, 1990 from W. Bruce Meyer, Director of Development and Construction, Nintendo, to Dale Traylor, Puget.

13. Letter dated October 22, 1990 from W. Bruce Meyer, Director of Development and Construction, Nintendo, to Dale Traylor, Puget.

14. Letter date December 6, 1990 from Paul Curl, Secretary of the Commission, to Elmer Sams, Manager of Tanner.

15. Letter dated January 10, 1991 to Stuart H. Clarke, Jr., Assistant Area Power Manager of BPA, and the document attached thereto entitled "North Bend Area Study--Transmission and Distribution."

16. Letter dated July 19, 1990 from R. R. Sonstelie, President of Puget to Elmer Sand [Sams], Manager of Tanner.

### III. ISSUES

Based on the facts and documents listed in the previous section, the petition raises the following issues:

1. Does the Commission have jurisdiction under RCW 34.05.240 and WAC 480-09-230 to issue a declaratory order in this matter?

2. If the Commission has jurisdiction, should the Commission in its discretion issue such an order?

3. Does Puget have an obligation to serve Nintendo under the facts and documents stipulated?

4. If Puget does not have an obligation to serve, is Puget in violation of the Service Area Agreement under the facts and documents stipulated?

### IV. COMMISSION DISCUSSION

1. Does the Commission have jurisdiction under RCW 34.05.240 and WAC 480-09-230 to issue a declaratory order in this matter?

The Administrative Procedure Act provides in pertinent part the following:

34.05.240 Declaratory order by agency---  
Petition---Court Review. (1) Any person may petition an agency for a declaratory order with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency. The petition shall set forth facts and reasons on which the petitioner relies to show:

(a) That uncertainty necessitating resolution exists;

(b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;

(c) That the uncertainty adversely affects the petitioner;

(d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested; and

(e) That the petition complies with

any additional requirements established by the agency under subsection (2) of this section.

...

(7) An agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

WAC 480-09-230 is a rule adopted by the Commission governing the entry of declaratory orders. That rule refers to "any interested person" being authorized to petition the Commission for a declaratory order.

All parties agree on brief that Tanner is an "interested person" under the language of the rule. They further agree that an actual controversy here exists. The statute and rule do not require a petitioner be an entity regulated by the Commission.

Tanner requests the Commission determine the applicability of RCW 80.28.110 to the stipulated circumstances. That statute reads as follows:

RCW 80.28.110 Service to be furnished on reasonable notice. Every gas company, electrical company or water company, engaged in the sale and distribution of gas, electricity or water, shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto, suitable facilities for furnishing and furnish all available gas, electricity and water as demanded.

The statute is a statute enforceable by the Commission, under the definition of the Administrative Procedure Act. Puget urges the Commission to find Puget has a duty as a public service company to serve Nintendo on request. Petitioner Tanner argues Nintendo is not "reasonably entitled" to service because of the existence of the Service Area Agreement.

The Commission has jurisdiction to issue a declaratory order regarding the applicability of RCW 80.28.110 to the stipulated circumstances.

Determination of the parties' contractual rights under the Service Area Agreement does not fall within the definition of

a "rule, order or statute enforceable by the agency". The Assistant Attorney General correctly notes on brief that 54.48 RCW requires only Commission approval of a regulated utility's participation in an agreement between electrical public utilities and cooperatives. There is no provision in Chapter 54.48 that the Commission will thereafter have any oversight or enforcement responsibilities regarding such agreements. The Commission has only those powers given to it by statute.

The Commission does not have jurisdiction to determine the parties' contractual rights under the Agreement.

The Assistant Attorney General also correctly concludes that Nintendo is not a necessary party to this proceeding. The Commission sent a Notice of Hearing to Nintendo. That company could have requested participation in the proceeding if it had desired. Nintendo will be served with electric service from one or the other of these companies after the resolution of the dispute. Nintendo would not be bound by the stipulated facts from this proceeding if it chose to participate in later litigation.

In conclusion, the Commission has jurisdiction to issue a declaratory order only on the issue of whether Puget has an obligation to serve. The Commission has no jurisdiction to interpret or enforce the Service Area Agreement. Interpretation of the Service Area Agreement should be done by the courts. The Commission's jurisdiction does not require Nintendo be a party to this proceeding.

2. If the Commission has jurisdiction, should the Commission in its discretion issue such an order?

The Commission is not required by the statute or rule to issue a declaratory order in these circumstances. However, the Commission has had experience in interpreting statutes regarding public service companies, including RCW 80.28.110. If this dispute is ultimately decided by the courts, the Commission's interpretation may assist the courts in their task.

The Commission finds that a declaratory order should be issued to determine whether Puget has an obligation to serve under RCW 80.28.110 in the stipulated circumstances. As discussed elsewhere in this order, the Commission does not have jurisdiction to interpret the Service Area Agreement.

3. Does Puget have an obligation to serve Nintendo under the facts and documents stipulated?

Puget contends that it has both a right and an obligation to serve a customer that has specifically requested

service from Puget, to be delivered at a point of delivery within Puget's service territory. Puget recognizes the Service Area Agreement as the only enforceable agreement establishing service area boundaries between the parties. Puget argues that its least cost plan is not relevant to the determination of whether it has an obligation to serve Nintendo.

Tanner urges the Commission to recognize the letter of October 20, 1967, as an amendment to the Service Area Agreement governing this situation. Tanner considers the point of delivery to be an attempt to circumvent the Agreement. Tanner requests the Commission find Nintendo not reasonably entitled to service despite its service request.

The Assistant Attorney General refers to the policies underlying Chapter 54.48 RCW, to eliminate the construction of duplicate facilities. He argues persuasively that permitting the construction of duplicating facilities could lead to selective service to only the most desirable classes of customers. Assuming the Service Area Agreement is valid and enforceable, Nintendo is not "reasonably entitled" to service by Puget.

The Commission accepts the reasoning of the Assistant Attorney General. A valid Service Area Agreement can limit Puget's statutory obligation to serve, assuming that Tanner is willing and able to provide the service. If the Service Area Agreement is found to be enforceable, Puget does not have a statutory obligation to serve Nintendo under the stipulated circumstances.

The determination of whether Puget may serve Nintendo must be made by the courts in connection with interpretation of the Service Area Agreement. No Commission law prohibits such service.

4. If Puget does not have an obligation to serve, is Puget in violation of the Service Area Agreement under the facts and documents stipulated?

Tanner requests the Commission find Puget in violation of the Service Area Agreement. Tanner on brief also requests the Commission issue a cease and desist order against Puget.

Puget and the Assistant Attorney General contend the rights of the parties to the Service Area Agreement should be determined by the courts.

As discussed above, the Commission does not have jurisdiction to issue a declaratory order interpreting the Service Area Agreement. The Service Area Agreement does not involve a "rule, order or statute enforceable by the agency".



Interpretation of the Service Area Agreement must be done by the courts.

Based on the record submitted, the Commission makes the following findings of fact and conclusions of law.

#### FINDINGS OF FACT

1. On December 27, 1990, Tanner filed a Petition for Declaratory Order requesting resolution of issues relating to service to Nintendo Corporation.

2. A prehearing conference was held on February 7, 1991. Although proper notice was sent to Nintendo, it did not appear. The parties agreed to submit a statement of agreed facts for the Commission's review.

3. Tanner and Puget filed stipulated facts and stipulated documents. The facts are recited above in Section II. The documents are listed in Section II but are not attached to this order. The Commission adopts the "Stipulation of Record" filed on February 15, 1991, as the factual basis for its declaratory ruling.

4. The parties submitted simultaneous briefs on March 1, 1991. No party requested authority to file reply briefs.

5. The parties agreed that this matter be submitted directly to the Commission on a record including the stipulated facts and documents and the briefs [TR 7-8].

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction to issue a declaratory order only on the issue of whether Puget has an obligation to serve. The Commission has no jurisdiction to interpret or enforce the Service Area Agreement.

2. Nintendo need not be a party to this proceeding for the Commission to exercise its jurisdiction.

3. The Commission should issue a declaratory order on the issue of whether Puget has an obligation to serve.

4. Puget does not have a statutory obligation to serve Nintendo under the facts and documents as stipulated. No Commission law prohibits such service.


Based on the above findings of fact and conclusions of law, the Commission enters the following order.

ORDER

WHEREFORE, IT IS HEREBY ORDERED That, pursuant to RCW 34.05.240 and WAC 480-09-230, the Commission issues a declaratory order that Puget does not have an obligation under RCW 80.28.110 to serve Nintendo, under the facts and documents stipulated by Tanner and Puget.

DATED at Olympia, Washington, and effective this 14th day of March, 1991.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



SHARON L. NELSON, Chairman



RICHARD D. CASAD, Commissioner



A. J. PARDINI, Commissioner

**NOTICE TO PARTIES:**

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).